IN THE MATTER of The Ontario Human Rights Code, R.S.O. 1970, Chapter 318.

AND IN THE MATTER of the complaint made by Mr. Shakil Ahmad of Toronto, Ontario, that he was dismissed from employment because of his race, colour and place of origin by the Corporation of the City of Toronto.

AND IN THE MATTER of the complaints made by Mr. Roy Sato and Mr. Archibald A. Lyn of Toronto, Ontario, that they have been discriminated against, and reprisals taken against them with respect to their employment because of their race, colour and place of origin by the Corporation of the City of Toronto.

D E C I S I O N

I was appointed as a board of inquiry on April 5, 1971, by the Minister of Labour, the Honourable Gordon Carton, Q.C., under The Ontario Human Rights Code, R.S.O. 1970, Chapter 318, to inquire into the complaint of Mr. Shakil Ahmad. A similar appointment was made on July 2, 1971, to inquire into the complaints of Mr. Roy Sato and Mr. Archibald A. Lyn. Both appointments directed me not only to inquire into the complaints which I have mentioned but also "to report to The Ontario Human Rights Commission in accordance with the said Act." The hearing in these matters commenced on August 3, 1971, occupied ten days, and did not conclude until July 18, 1972. After the hearing had been under way, amendments to The Ontario Human Rights Code, which had been passed by the Legislature in 1971, were proclaimed in force on April 17, 1972. The amendments included provisions which had the effect of changing the procedure relating

to boards of inquiry. One of the changes was that, whereas the procedure contemplated by the Code on the dates of my appointments required a board of inquiry "to investigate the matter" and "if it finds that the complaint is supported by the evidence, it shall recommend to the Commission the course that ought to be taken with respect to the complaint," under the Code as amended by 1971, Volume 2, Chapter 50, section 63, the board is required "to hear and decide the complaint". Under the new procedure, therefore, a board of inquiry no longer reports to the Ontario Human Rights Commission with its recommendations but itself makes a decision. The law is clear that although newly enacted legislation will, in the absence of any express provision to the contrary, not be interpreted to operate retrospectively in a way that would prejudice established substantive rights, legislative alterations in procedure are retrospective unless some good reason exists against it. In this connection, section 14(2) of The Interpretation Act, R.S.O. 1970, chapter 225, provides, in part, as follows:

> "If other provisions are substituted for those so repealed or revoked,
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>
> (b) all proceedings taken under the Act, regulation or thing so repealed or revoked, shall be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be;"

What follows, then, is the decision of the board of inquiry.

As already indicated, the hearing was an exceptionally

lengthy and protracted one. Throughout these difficult proceedings Mr. John Sopinka appeared on behalf of the Commission, Mr. B. A. Dunn for the complainants and Mr. S. L. Robins, Q.C., (as well as Mr. D. C. Lyons for the first three days) for the respondent, the Corporation of the City of Toronto. I cannot adequately express my gratitude for the assistance which I received from counsel. During the course of the hearing, the state of, and relationships within, the Accounting Division of the Corporation of the City of Toronto's Department of Budgets and Accounts were very carefully surveyed, if not microscopically examined, from the date of the creation of the Department as an independent department in 1968 until the conclusion of the hearing in July 1972. What was revealed was a sorry state of affairs, indeed, characterized by an absence of harmony, low morale, bitterness and even petty bickering for which no individual or group of individuals can be blamed but which, nevertheless, must surely be prejudicial to the proper running of an important civic department of a great city. The nature of the inquiry was such that a purely chronological description of events would not be advisable. We must begin with the principal complainant, Mr. Shakil Ahmad.

Mr. Ahmad is a Chartered Accountant who qualified in 1965. He was born in India before the partition of the sub-continent into India and Pakistan, and describes himself as of Pakistani origin politically, and of the Indian sub-continent racially. He was employed by the Corporation of the City of Toronto as a Senior Accountant from

December 19, 1966, when he first entered the civic service until November 12, 1971, when his employment with the City was terminated. His complaint, dated December 11, 1970, under the Code reads as follows:

> "I, Shakil Ahmad Residing at 5 Dufresne Court, Apt. 302, Don Mills, Tel. 429-0860, complain against The Corporation of the City of Toronto, whose address is New City Hall, Toronto, Ontario, Tel. 367-7071 who allegedly committed an unlawful Act relating to employment on or about Sept. 8/70 and Nov. 12/70 through Mr. John D. Yockey, Commissioner of the Department of Budgets and Accounts and Mr. William MacMunn, Director of Accounting of the Department of Budgets and Accounts because of RACE, COLOUR, PLACE OF ORIGIN.
>
> The Particulars Are: I Shakil Ahmad, was employed as a senior accountant by the respondent for four years since December, 1966. As a qualified chartered accountant I was engaged in accounting work with the Department of Budgets and Accounts. My work performance was competent and prior to the events complained of I received no adverse comment on my work. On September 8, 1970 I was summarily asked to resign by Mr. MacMunn who stated that his request was endorsed by Mr. Yockey. Mr. MacMunn further stated that I would be given assistance in re-locating if I kept the matter secret. By letter dated October 14, 1970, I protested this treatment and refused to resign. By letter dated November 12, 1970 I was discharged by Mr. Yockey, such discharge to be effective immediately. I am a Canadian citizen of Pakistani origin and I have reason to believe that I was asked to resign my position and was subsequently discharged because of my race, colour and place of origin, contrary to section 4 of the Ontario Human Rights Code, 1961-62 (as amended).
>
> Dated at Toronto on December 11, 1970.
>
> (signed) 'S. Ahmad' "

An earlier complaint, in similar terms was made by Mr. Ahmad on October 29, 1970, but it was subsequently withdrawn. When Mr. Ahmad commenced

his employment with the City, the Department of Budgets and Accounts was not a separate department but was part of the Department of Finance. Budgets and Accounts became a separate department with the reorganization of the Finance Department in July, 1968, when Mr. John Davy Yockey became Commissioner of Budgets and Accounts, a newly created position. The Department of Budgets and Accounts is divided into two divisions, the Accounting Division and the Budgets Division, each division being presided over by Directors who report to the Commissioner of Budgets and Accounts, and the Director of Budgets acting for the Commissioner in his absence. In practical terms, of the two divisions making up the Department, the Budgets Division is the senior. At all material times Mr. Yockey was the Commissioner of Budgets and Accounts. Our chief concern in this inquiry is the Accounting Division. This division is headed, as I have already indicated, by a Director. Immediately under the Director is the Assistant Director, and at all material times the Assistant Director has been Mr. Philomeno Larcina. Serving directly under the Assistant Director, for organizational purposes, are Senior Accountants who preside over sections staffed by clerical employees, the senior one of whom may be conveniently designated as a supervisor. The sections, at the time of the hearing were four in number, namely, Vouchers Payable, Pre-Payment Audit, General Ledger, and Payroll, the Senior Accountants of which were, respectively, Mr. Ahmad, Mr. Roy Sato, Mr. Archibald Lyn, and Mr. B. Waschtchuk. All employees in the Accounting Division from and above the rank of Senior Accountant, i.e. the Senior Accountants, the Assistant Director,

the Director, and the Commissioner, may properly be considered to be professional and managerial in status. The four Senior Accountants and the Assistant Director may be described, for the purposes of this decision, as members of ethnic minorities. I shall return to the problems of the division later.

As a result of Mr. Ahmad's complaint an investigation was conducted by Mr. Michael Walker, a Human Rights Officer employed by the Ontario Human Rights Commission. The investigation included interviews with members of the Department of Budgets and Accounts and some senior members of the civic service including the Commissioner of Personnel and the Director of Labour Relations for the City. The interviews were conducted at City Hall from January 15, 1971 to March 15, 1971 and, not surprisingly, caused a certain departure from every-day routine as well as a considerable degree of nervousness. Towards the end of the Commission's investigation into Mr. Ahmad's complaint, Mr. Archibald Lyn and Mr. Roy Sato filed their complaints. In the case of each there are two complaints, dated March 4, 1971 and March 24, 1971. Mr. Lyn's complaint of March 4, 1971 reads as follows:

> "I, ARCHIBALD A. LYN, Residing at 52 Fontainebleau Drive, Willowdale, Telephone: 223-6833 complain against the Corporation of the City of Toronto whose address is New City Hall, Toronto, Ontario, Telephone: 367-9111 who allegedly committed an unlawful Act relating to employment and my taking part in proceedings under the Code on or about November 17, 1970, January 28, 1971 and February 25, 1971 through John D. Yockey and William MacMunn, commissioner and Director respectively of the Department of Budgets and Accounts because of Race, Colour, Nationality, Ancestry and Place of Origin.
>
> The Particulars are:

1. Shakil Ahmad had been employed as a Senior Accountant by the respondent since December, 1966. He worked in the same Department in which I am presently employed. Though he was a qualified and competent Chartered Accountant and though there had been no adverse comments directed at his work he was discharged on November 12, 1970.

2. On December 11, 1970 Shakil Ahmad filed a complaint with the Ontario Human Rights Commission.

3. Prior to the date of filing the complaint and specifically on November 17, 1970 I supported Mr. Ahmad in openly taking the position that he ought not to have been discharged as there was not just cause for dismissal.

4. Subsequent to December 11, 1970 I have participated in the inquiry made by the Ontario Human Rights Commission with respect to the dismissal of Shakil Ahmad and I have been interviewed on the premises of the respondent by C. Michael Walker, Human Rights Officer.

5. In addition to being interviewed on the premises of the respondent I have attended at the offices of the Ontario Human Rights Commission with respect to the inquiry into the reasons for dismissal of Shakil Ahmad.

6. My support of Shakil Ahmad in both the area of questioning the basis for his dismissal and in assisting him in the proceeding still before the Ontario Human Rights Commission is well known to both Mr. Yockey and Mr. MacMunn and is thereby known to the respondent.

7. By letter dated January 28, 1971 from Mr. MacMunn to myself I was accused of "rudeness and insubordination" at a meeting held on November 19, 1970. The reference to November 19, 1970 is obviously an error and the reference should be to a meeting held on November 17, 1970 which is one of the dates specifically complained of in paragraph 3 above. In the letter of January 28, 1971 I was informed that the complaint was to be placed on my employee record and I was threatened with automatic suspension from my employment. At the meeting of November 17, 1970 attempts were made to discuss the dismissal of Shakil Ahmad in the presence of both Mr. Yockey and Mr. MacMunn and they refused to discuss it. The allegations made against me with respect to insubordination and rudeness are completely groundless.

8. By letter dated February 16, 1971 from myself to Mr. MacMunn I denied the allegations referred to in his letter of January 28, 1971 and asked that my employee records be rectified and that the last mentioned letter be removed therefrom. By letter dated February 25, 1971 from Mr. MacMunn to myself and that was received by me on March 1, 1971 at 2:50 p.m. I was advised that my employee record would not be corrected and the charges of insubordination and rudeness would remain thereon together with the threat of automatic suspension in future.

9. I am a British subject of Chinese origin and I have resided in Canada for the past 4 years. I am employed by the respondent as a Senior Accountant and have been so employed since the 12th day of July, 1967. I am an Associate of the Association of Certified and Corporate Accountants and also a member of the British Institute of Management. I have never had any adverse comment from anyone with respect to my work for the respondent.

10. My complaint is that the respondent has contravened the provisions of section 4(1) and section 5(b), (c), (d), (g) and (h) of The Ontario Human Rights Code. In my complaint I ask that the Commission regard this matter as being more than simply a single complaint filed by me. The Commission already has before it the complaint of Shakil Ahmad which has not been brought to a conclusion. In addition, as of the date of filing of this complaint by me, there is an additional complaint of which I have knowledge made by Roy Sato who is also a Senior Accountant in the same Department as myself and also the Department in which Shakil Ahmad was formerly employed.

Dated at Toronto this 4th day of March, A.D. 1971.

(signed) 'A. A. Lyn'
ARCHIBALD A. LYN
COMPLAINANT"

His complaint of March 24, 1971, is in the following language:

"I, ARCHIBALD A. LYN Residing at 52 Fontainebleau Drive, Willowdale, Ont. Tel. 223-6833 complain against The Corporation of the City of Toronto whose address is New City Hall, Toronto, Ontario Tel. 367-9111 who allegedly committed an unlawful Act relating to discrimination and harrassment on or about 1970 and 1971 through John D. Yockey and William MacMunn because of RACE, COLOUR, NATIONALITY, ANCESTRY, PLACE OF ORIGIN.

The Particulars Are:

The respondent through John D. Yockey and William MacMunn discriminated against and harrassed the complainant in the contravention of Section 4(1) and Sections 5(b), (c), (d), (g) and (h) of The Ontario Human Rights Code.

Dated at Toronto, Ontario on March 24, 1971.

(signed) 'A. A. Lyn' "

Mr. Sato's complaint of March 4, 1971, reads as follows:

"I, ROY SATO
Residing at 7272 Vernor Drive, Mississauga, Ontario, Telephone: 677-8290 complain against the Corporation of the City of Toronto whose adress is New City Hall, Toronto, Ontario Telephone: 367-9111 who allegedly committed an unlawful Act relating to employment and my taking part in proceedings under the Code on or about October 14, 1970, November 17, 1970, January 15, 1971, January 18, 1971, January 21, 1971, January 28, 1971, February 1, 1971, February 11, 1971, and March 1, 1971 through John D. Yockey and William MacMunn, Commissioner and Director respectively of the Department of Budgets and Accounts because of Race, Colour, Nationality, Ancestry and Place of Origin.

The Particulars are:

1. Shakil Ahmad had been employed as a Senior Accountant by the respondent since December, 1966. He worked in the same Department in which I am presently employed. Though he was a qualified and competent Chartered Accountant and though there had been no adverse comments directed at his work he was discharged on November 12, 1970.

2. On December 11, 1970 Shakil Ahmad filed a complaint with the Ontario Human Rights Commission.

3. Prior to the date of filing the complaint and specifically on November 17, 1970 I supported Mr. Ahmad in openly taking the position that he ought not to have been discharged as there was not just cause for dismissal.

4. Subsequent to December 11, 1970 I have participated in the inquiry made by the Ontario Human Rights Commission with respect to the dismissal of Shakil Ahmad and I have been interviewed on the premises of the respondent by C. Michael Walker, Human Rights Officer.

5. In addition to being interviewed on the premises of the respondent I have attended at the offices of the Ontario Human Rights Commission with respect to the inquiry into the reasons for dismissal of Shakil Ahmad.

6. My support of Shakil Ahmad in both the area of questioning the basis for his dismissal and in assisting him in the proceeding still before the Ontario Human Rights Commission is well known to both Mr. Yockey and Mr. MacMunn and is thereby known to the respondent.

7. By letter dated January 28, 1971 from Mr. MacMunn to myself I was accused of "rudeness and insubordination" at a meeting held on November 19, 1970. The reference to November 19, 1970 is obviously an error and the reference should be to a meeting held on November 17, 1970 which is one of the dates specifically complained of in paragraph 3 above. In the letter of January 28, 1971 I was informed that the complaint was to be placed on my employee record and I was threatened with automatic suspension from my employment. At the meeting of November 17, 1970 attempts were made to discuss the dismissal of Shakil Ahmad in the presence of both Mr. Yockey and Mr. MacMunn and they refused to discuss it. The allegations made against me with respect to insubordination and rudeness are completely groundless.

8. On Friday, January 15, 1971, Mr. MacMunn approached me with an Employee Performance Report which indicated that my work performance was very good but that I was involved in certain incidents which warranted adverse criticism. I indicated to Mr. MacMunn that I did not agree with these adverse comments but felt compelled to sign the report simply in acknowledgement of it. He assured me that no disciplinary considerations were involved. On the 18th day of January, 1971, I made a point of seeing Mr. MacMunn in his office to again remind him that I did not agree with the adverse comments made in the Employee Performance Report. He stated, that being the case, he would have to write a new Employee Performance Report and he tore up the one which he had previously drafted. In the following weeks, an Officer of the Human Rights Commission came into the offices of the Department of Budgets and Accounts to conduct an investigation to determine whether there had been discrimination against Mr. Shakil Ahmad. During this period, I was advised by Mr. MacMunn that my Employee Performance Report had not been finalized. On February 11, 1971, shortly after the Officer from the Human Rights Commission completed his investigation, several letters and memoranda were delivered to my desk. These letters and memoranda are dated January 28 and February 1, 1971.

They refer to incidents which occurred on October 14 and November 19, 1970 and to a letter of mine to my staff dated January 21, 1971. They are very critical of me. They accuse me of rudeness and insubordination, of deliberate malice and irresponsibility, and contain other serious allegations. They advise me that in the future I may be subject to automatic suspension or some other serious disciplinary action.

9. By letter dated February 16, 1971 I complained about Mr. MacMunn's treatment of me on January 15, 1971, January 18, 1971 and February 11, 1971 and I took the position and maintain the position that the charges made against me in letters dated January 28, 1971 and February 1, 1971 were groundless. By letter dated March 1, 1971 which was received by me at 2:50 p.m. from Mr. MacMunn, I was told that my employee records would not be rectified; I was told that I was being untruthful in my letter of February 16, 1971; I was threatened with disciplinary action including suspension; and no offer of conciliation of any differences was made nor was an offer of apology made although a demand was made that I apologize.

10. I am a Canadian citizen of Japanese origin. I am employed by the respondent as a Senior Accountant and have been so employed since the 3rd day of January, 1967. I am a Chartered Accountant and Registered Industrial Accountant. I have never had any adverse comment from anyone with respect to my work for the respondent.

11. My complaint is that the respondent has contravened the provisions of section 4(1) and section 5(b), (c), (d), (g) and (h) of The Ontario Human Rights Code. In my complaint I ask that the Commission regard this matter as being more than simply a single complaint filed by me. The Commission already has before it the complaint of Shakil Ahmad which has not been brought to a conclusion. In addition, as of the date of filing of this complaint by me, there is an additional complaint of which I have knowledge made by Archibald A. Lyn who is also a Senior Accountant in the same Department as myself and also the Department in which Shakil Ahmad was formerly employed.

DATED at Toronto this 4th day of March, A.D. 1971.

(signed) 'R. S. Sato'
ROY SATO
COMPLAINANT "

His complaint of March 24, 1971, is in the following terms:

"I, ROY SATO Residing at 7272 Vernor Drive, Mississauga, Ont. Tel. 367-9111 complain against The Corporation of the City of Toronto whose address is New City Hall, Toronto, Ontario Tel. 367-9111 who allegedly committed an unlawful Act relating to discrimination and harrassment on or about 1970 and 1971 through John D. Yockey and William MacMunn because of RACE, COLOUR, NATIONALITY, ANCESTRY, PLACE OF ORIGIN.

The Particulars Are:

The respondent through John D. Yockey and William MacMunn discriminated against and harrassed the complainant in the contravention of Section 4(1) and Sections 5(b), (c), (d), (g) and (h) of The Ontario Human Rights Code.

Dated at Toronto, Ontario on March 24, 1971.

(signed) 'R. S. Sato' "

For the sake of completion I add that on March 5, 1971, Mr. Sato's solicitor, Mr. Dunn, wrote to the Commission to add an additional ground of complaint. I quote the body of his letter:

"Subsequent to the filing of the complaint by Mr. Sato on March 4, 1971 there has been a further act of harassment and discrimination by the respondent and particularly Mr. W. MacMunn against Mr. Sato and we accordingly add the following complaint:

'On March 4, 1971 Mr. MacMunn gave to Mr. Sato an Employee Performance Report that is dated February 26, 1971. The Performance Report is one in which Mr. Sato received comment with respect to his employment by which he was rated in the second lowest category with respect to 3 out of 8 items of comment and his overall rating was that of being in the second lowest category. More important Mr. Sato was advised that his annual increment of approximately $1,100.00 was being withheld notwithstanding that he has been previously advised by Mr. MacMunn that the increment was forthcoming. The Employee Performance Report does not accord with the very good grading given to Mr. Sato in a Report recently prepared by Mr. MacMunn on January 15, 1971.' "

The evidence of Mr. Robert G. Humphrey, the Commissioner of Personnel for the City, which I unhesitatingly accept without reservation, establishes that whatever may have been the City's earlier employment practices at a time when each civic department was responsible for its own hiring, since 1945 when the responsibility for recruitment, screening, and referral of personnel became centralized in the Department of Personnel under the Commissioner of Personnel, the City's employment policy has been characterized by its openness in the sense of no discrimination based on race, creed, colour, nationality, ancestry or place of origin. So definitely is this the case that it was not possible for Mr. Humphrey to give a breakdown of the City's employees on the basis of ethnic background. I add, in passing, since the matter was raised at the hearing, that no significance can be attached to the circumstance that, at the highest level, it would appear that none of the City's Commissioners, or heads of civic departments, appears to be a member of an ethnic minority. This can be accounted for by so many factors that it is irrelevant. There is no reason to conclude that it is even remotely the result of discrimination in any form that the Code is concerned with. Furthermore, as the number of employees in the Accounting Division of the Department of Budgets and Accounts who are members of ethnic minorities attests, no such discrimination has been practised in the initial employment, i.e. hiring, of personnel for this division. The real question for this board, however, is whether, despite the absence of practices of a

discriminatory nature in the hiring of personnel, the treatment of personnel, once hired, and, of course, specifically of the three complainants, has been marked by discrimination. I completely accept Mr. Sopinka's submission that discrimination is a difficult matter to prove by direct evidence and that when it is alleged, the circumstantial evidence must be carefully examined in a cumulative way. It has been a difficult task but I have sought to do so. As to the burden of proof, I should add that, on all of the evidence, including the testimony of 23 witnesses and some 53 exhibits of varying length and complexity, I have arrived at my conclusions in the conviction that they have been established even beyond the degree of a preponderance of probability, the standard which ordinarily applies in civil matters.

The history of the Accounting Division of the Department of Budgets and Accounts, since the creation of the Department, has been marked, as I have said, by difficulty and low employee morale. I am sure that some of its problems arose out of the universal natural resistance to the introduction of new methods which are incompatible with habitual patterns of work. Two important developments may be mentioned in this connection. It appears clear on the evidence that, from the very inception of the Department, a problem was created by the necessity of employees to adapt their traditional and laborious manual methods to the use of the computer which had been introduced in the civic service in the early sixties. One infers from the evidence that complete acceptance of computerized methods and the corresponding

adaptation had, as recently as the date of the conclusion of the hearing, not yet become realities. This problem, not unique to the civic service, was a factor making for a general malaise in the division. Perhaps even more important, however, was a conclusion, arrived at somewhat anonymously when the department was created but widely disseminated, discussed and feared, that the Accounting Division was "top-heavy", that is, given the needs of the division, contained more supervisory or management personnel than necessary, and that one of the Senior Accountant's position should be done away with. I have no doubt that this factor was responsible for creating a great deal of insecurity among the accountants as well as a certain amount of unfortunate competitiveness among some of them and at least between two of them, Mr. William MacMunn, who, at the beginning of the period with which we are concerned, was a Senior Accountant with the same status as that of Mr. Sato and Mr. Lyn, and Mr. Sato.

In June, 1968, the Director of the division was one H. J. Kirk, and Mr. Larcina was, as he continued to be throughout the period with which we are concerned, the Assistant Director. Mr. Ahmad, as a Senior Accountant, was not then discharging any supervisory responsibilities but was occupied with Reports and Financial Statistics. Mr. Lyn, also a Senior Accountant, was assigned to Capital Projects, a function which did not involve supervision of other personnel. Three other Senior Accountants were section heads with supervisory responsibility over non-managerial personnel, Mr. Sato in Expense Distribution,

Mr. William MacMunn in General Ledger, and Mr. Waschtschuk in Subsidies and Recoveries. Mr. MacMunn, then, was not in a superior position to the complainants but was rather simply one of their peers. In May, 1968, a study of operations of the Accounting Division, then a division of the City's Finance Department, had been done by the Organization and Methods Division of the Finance Department. This of course was before Mr. Yockey's appointment as Commissioner of Budgets and Accounts. There can be no suggestion that the study was in any way infected by discrimination or was otherwise than objective. It was, however, highly critical of the division's operations. It found that the division had substandard staff and that this "constituted a serious problem". The study showed serious weakness in management effectiveness in that there were too many layers of command in various areas, delegation was inadequate, motivation was weak and communications were poor. On the subject of supervision the study concluded that supervisors and managers "did not appear to be doing the jobs of management". The one Senior Accountant singled out for special mention was Mr. MacMunn, of whom it was said that "[W]e believe Mr. MacMunn is a most able manager and that he should be asked to undertake this job of organizing the Voucher Section only on a temporary basis. Once the section is established, it could be supervised by a lesser qualified person, and Mr. MacMunn used in a more responsible position -- perhaps in developing the Division Manual and establishing better liaison with the Data Processing operation."

Such was the state of the division, then, when it

became a division of the newly created Budgets and Accounts Department a few months later when Mr. Yockey was appointed Commissioner in July, 1968. A formidable task awaited him. So formidable was it that it remained unaccomplished when, on April 1, 1972, he left the civic service to return to Philadelphia to become managing director for administrative services for the school district of the City of Philadelphia. Mr. Yockey came to the job as Commissioner of Budgets and Accounts with an enviable record of accomplishments. What is equally important, his work in the past had required him to work with persons who were members of ethnic minorities including what was referred to at the hearing as "visible minorities". There was no suggestion in that earlier record of racial discrimination on his part or attitude of racism. His manner of speech when excited, and during his term of office as Commissioner there was often cause for excitement, was such that it might easily upset, and be abrasive to, sensitive subordinate personnel of any ethnic background, and there was no lack of sensitive personnel in the Accounting Division. Mr. Yockey also possessed strong views on the role and responsibility of management, which included the need to support the decisions of supervisory personnel with relation to their subordinate employees, and a marked distaste for insubordination. It is probably also a reasonable inference from the evidence that from time to time his judgment on the strengths and weaknesses of some of the members of the Accounting Division may have been questionable. But to so infer is to have the benefit of the wisdom that comes from hindsight. I refer, in particular, to his assessment of the qualifications of

Mr. William MacMunn about which I shall say more later. But of one matter I am certain, namely, that Mr. Yockey at no time while he was Commissioner was motivated, in any decision which he made, by considerations of race, creed, colour, nationality, ancestry or place of origin. I categorically reject the allegation made against him at the hearing that he ran a racist administration. For a full appreciation of the atmosphere of tension within the Accounting Division during the entire period of Mr. Yockey's administration, it should be pointed out that, after Mr. MacMunn's appointment as Director of Accounting in 1969, but before any of the specific events of which the complainants complain, informal and vague, so far as the evidence at the hearing disclosed, representations about an environment of discrimination and racism had been made by several members of the division, of whom Mr. Roy Sato appears to have been the principal one, to the Ontario Human Rights Commission.

In the summer of 1969, Mr. H. J. Kirk left the civic service of the City of Toronto for other employment, leaving vacant the position of Director of Accounting. In accordance with established practice, an objective board was appointed by the Commissioner of Personnel to conduct oral interviews of applicants for the vacated position. The members of the examining board were Mr. Reginald W. Lewis, the Secretary-Treasurer of the Parking Authority of Toronto, Mr. M. Smith of the Personnel Department of the City of Toronto, and Mr. J. Pickard, the Deputy Treasurer of the Municipality of Metropolitan Toronto. No support can be found for any conclusion that these persons were concerned about any criterion for the position of Director other than competence

irrespective of ethnic background. Any suggestion that any attempt to influence their judgment on the part of anyone, including Mr. Yockey, is easily dismissed and I do so. Before discussing the applicants for the position, I pause to say that the practice in the City is for the examining board to certify to the relevant Commissioner the top three candidates along with their respective marks. The Commissioner makes the selection from the persons so certified but is not obliged to select the candidate with the highest marks, although it would surely be rare for the best candidate to be rejected.

Of the Senior Accountants in the Division, Mr. MacMunn was asked by Mr. Yockey to apply for the vacant position. Mr. MacMunn, it will be recalled, was singled out for special mention in the study of the division's operations by the Organization and Methods Division of the Finance Department as a person with proven managerial skills. Mr. MacMunn himself believed that Mr. Larcina, the Assistant Director, was more qualified for the position but, according to his evidence, decided to apply because he was worried by the gossip that one of the Senior Accountants would have to be discharged in an attempt to solve the problem of a disproportionate number of supervisory personnel in the division, and he did not want to become the discharged supervisory person. Whether by design or not, or because of the nature of his character, Mr. MacMunn advertised to some of the other Senior Accountants that Mr. Yockey had suggested he apply for the vacant position. Unfortunately, the effect of this communication was to

create the impression among his highly sensitive colleagues that he was the "favourite son" or, to use another phrase that was heard at the hearing, that "he had it in the bag". Not unnaturally, a sense of injustice or unfairness was thus generated. Mr. Larcina, who is of Spanish Portuguese descent, and an obvious prospective candidate for the position, declined to apply. In his testimony, and, it appears, to others in the division at the time, he gave as his explanation for not applying his belief that the contest was unfair. He testified, however, that he did not believe that racial discrimination was involved. The impression that one is left with is that the unfairness which he felt was favouritism. Indeed, although Mr. Larcina was reluctant to answer questions relating to his view of the relative abilities of Mr. MacMunn and Mr. Sato, he answered without hesitation that, since Mr. Yockey had become Commissioner and Mr. MacMunn, the Director, he was not aware of any incidents that would lead him to believe that a racist policy was being carried on by them. It is more than conceivable that if Mr. Larcina had applied for the position, the entire history of the Division would have been different. Mr. MacMunn's selection did nothing to ameliorate the steady deterioration in morale and efficiency in the Division.

In fact, Mr. MacMunn did not achieve the highest marks before the interviewing board. There were five candidates, Messrs. Waschtschuk, MacMunn, Sato, and Lyn and Mr. D. P. Cornish. Messrs. Waschtschuk and Lyn were adjudged "Not Qualified" by the board, Mr. Cornish obtained a mark of 75, the highest mark given and, it is reasonable to suppose, would have been selected for the job

had he not immediately accepted another and more senior position elsewhere. Messrs. MacMunn and Sato were each awarded the identical mark of 70. Both were then interviewed by Mr. Yockey and, in the result, Mr. MacMunn was chosen. Mr. Sato attributes Mr. Yockey's selection of Mr. MacMunn to his practice of racial discrimination, for Mr. Sato is a Canadian of Japanese descent and Mr. MacMunn is a Canadian of Anglo-Saxon descent. Mr. Sato describes friction which he felt in the interview he had with Mr. Yockey as a reflection of Mr. Yockey's racial bias. I believe that this view is unjustified by any discernible evidence and arises out of Mr. Sato's hypersensitivity. He is convinced, on his own evidence, that any objective person would have no difficulty in seeing that his competence exceeds that of Mr. MacMunn. His process of reasoning takes him one step further to the conclusion that anyone who could choose Mr. MacMunn over him must be racially prejudiced. The effect on Mr. Sato's judgment of his acute sensitivity can best be illustrated by quoting some of the evidence which he gave in cross-examination:

> "Q. Just one further question, then, Mr. Sato. You indicated to the Chairman that your opinion was that you were more highly qualified to be Director than Mr. MacMunn in 1969?
>
> A. Yes.
>
> Q. Is that right?
>
> A. Yes.
>
> Q. And carrying on from that, do you say then that the fact that the Board decided that you and Mr. MacMunn be given equal rating was another incident of racial discrimination against you?

A. Well, let me just relate to you what Mr. MacMunn told me.

Q. Never mind what Mr. MacMunn told you. Direct your mind to the question I put to you.

A. Yes.

Q. Are you saying that the Board in giving you equal standing with MacMunn was acting in a discriminatory manner, and if hadn't been acting in a discriminatory manner it would have given you a higher standing than MacMunn?

A. Yes.

Q. You are now, then accusing Mr. Lewis -- what was his position again? He is with the Parking Authority?

A. I believe so.

Q. Mr. Picard -- is he the Treasurer of Metropolitan Toronto -- Deputy Treasurer; and Mr. Milne Smith of the City of Toronto, of the Personnel Department. You are accusing them, I take it, of conspiring together to deprive you of the recommendation that you felt that you were entitled to on it?

A. Oh, this may have been influenced by Mr. Yockey.

Q. Well, whatever they were influenced by, if they were influenced on the ground of your minority status, I would find that objectionable, wouldn't you?

A. Yes.

Q. And you say they were influenced on that ground?

A. Yes.

Q. What evidence do you have of that?

A. The fact that I believe that in my work at the City I had performed my duties in a manner more competent than Mr. MacMunn. Mr. MacMunn was prone to making errors. He was prone to misunderstanding the computer programmes. I can recall sometimes arguing with him on computer programmes and accounting procedures and he would misunderstand how an entry -- an accounting entry should be done.

Q. Are you saying that any person acting in a reasonable

and objective way would have undoubtedly, unquestionably come to the conclusion you were a superior candidate to MacMunn?

A. At the Board I would say that my qualifications as not only a Chartered Accountant but also a member of the Society of Industrial Accountants, as well as my experience at the Province of Ontario, might have weighed in my favour or should have weighed in my favour.

Q. Are you saying that any Board acting fairly and without bias would without question have ranked you higher than MacMunn?

A. Especially in view of the fact that Mr. MacMunn reported to me.

Q. I am asking the question. Are you saying that the Board -- a Board acting in a fair and just manner without bias would have given you a higher rating than MacMunn?

A. Yes.

Q. And that because this Board didn't give you a higher rating it must therefore have been biased?

A. Yes.

Q. And the only reason that the Board didn't give you a higher rating, in conclusion, is because it was influenced against you by reason of the fact that you are of Japanese descent?

A. Yes."

In repeating my conclusion that Mr. MacMunn's selection as Director was not the product of racial or ethnic discrimination, I must add that, whatever his abstract managerial abilities may be, in retrospect it is easy to see that the discontent within the Division was exacerbated by his appointment, for, as will be shown later, he lacks sufficient sensitivity for the feelings of members of ethnic minorities. One would have thought that such sensitivity was essential for the Director, given the composition of the Division. In any event, not long after Mr. MacMunn's appointment in the Fall of 1969, Mr. Sato, with others, went to the Ontario Human Rights Commission with allegations of racial

discrimination in the Department. Mr. MacMunn's appointment was one of the particulars on which he was relying in making those allegations. From that time on the atmosphere was hardly conducive to harmony within the Division.

Continued efforts were made after Mr. MacMunn's accession to the directorship of the Division to increase the efficiency of the Division. The staff was reduced in size and consolidation took place in an attempt to give professional personnel the opportunity to exercise supervisory functions. Until May 1970, Mr. Ahmad, whose position as a Senior Accountant contemplated the performance of supervisory duties, in fact, supervised no one. With the reorganization which occurred in May, 1970, he was put in charge of the Vouchers Payable section of the Division with some seventeen employees under his jurisdiction. His job was not easy for he was new to supervision and, at the same time, his section had a regrettably large proportion of personnel who were less than fully competent. To compound the problem, again at the same time, a new system of processing vouchers was introduced, the alphabetical system. Prior to May 1970, employees were accustomed to dealing with vouchers of particular departments and were familiar with the kind of vouchers seen and with the problems and personnel of the departments whose vouchers they processed. Under this system a different employee would handle different vouchers of the same supplier who supplied goods or services to several departments of the City with the consequence that a multiplicity of cheques might be issued to one supplier. The essence of the alphabetical system was that the same clerk handled all the vouchers payable of the supplier

whose name began with an initial for which that clerk was responsible and irrespective of the number of departments to which that supplier provided goods or services. This change in system caused an already slow staff to slow down even more. Some of the staff had no problem but a few had very serious problems. One of the results was that a large backlog of unprocessed vouchers was created, particularly in the summer of 1970, and, on various occasions, the City lost the advantage of discounts that timely payment of accounts would have afforded. Adding to Mr. Ahmad's difficulties was Mr. MacMunn's advice not to discipline a particularly delinquent employee. The Division had very recently experienced an unfavourable arbitration award arising out of an act of discipline and this caused an attitude of extreme caution in disciplinary situations for a period of time.

All of these circumstances were matters over which Mr. Ahmad really had little control and were handicaps to achievement on his part. But in addition to these matters, he seems clearly to have experienced some difficulty in performing his supervisory role. Employees complained that they could get no guidance from him. These complaints reached the ear of Mr. MacMunn. It appears that as early as August, 1970, Mr. MacMunn had tentatively decided to discharge Mr. Ahmad. To discharge a professional person was a serious matter. It appears that, in the entire civic service, there were only two recorded instances of earlier discharges of professional employees. Mr. Larcina, with whom Mr. MacMunn discussed the matter, felt that Mr. Ahmad had not been given a sufficiently reasonable trial period, even by the date of his actual dismissal. Such a decision in

July was surely premature. In any event, nothing was done until September 8, 1970 when Mr. MacMunn spoke to Mr. Ahmad and effectively asked for his resignation. He told Mr. Ahmad that he should look for other employment, that he could stay on until he found a suitable job, that he would give him a reference, and that in the meantime the matter would be kept confidential. It is easy to understand the sense of shock that Mr. Ahmad felt on receiving this communication. He was understandably disturbed. On October 14, Mr. Ahmad wrote to Mr. Yockey expressing his sense of outrage in language which suggested motives other than the one expressed, namely, lack of competence, for the decision. The body of the letter is reproduced hereunder:

> " No doubt you are aware that I have been asked to tender my resignation on the grounds that my section is not functioning properly. This highhanded and unjust request is an outrage, and must be deprecated in the strongest possible terms.
>
> In the absence of any precedent, it is impossible to determine what criteria were used in arriving at such a drastic decision. However, it is obvious to anyone equipped with commonsense, that the action taken against me is in striking contrast with the permissiveness and cordiality that is being extended towards certain other employees. The decision is so lacking in honesty that I was asked not to divulge it to anyone. The exposure of injustice is seldom beneficial to the perpetrators.
>
> As the standards and criteria used in assessing management performance in the Accounting Division have never been defined, how can an employee be criticized for not attaining them? Is there an employee evaluation system in operation in the Division? If so, why has this not been disclosed? On the other hand, if such a system does not exist, how can anyone be sure that decisions are fair and consistent?
>
> The reasons given to me to back up the request for my resignation are obviously spurious, and leave an enormous credibility gap. What, then, were the real reasons? Everyone has the right to know the truth. When a drastic and potentially damaging action is taken against a person, the need for truth acquires a grave urgency.

I demand that the truth be told."

Mr. Yockey, who, as I have intimated, is somewhat authoritarian in his disapproval of conduct amounting to insubordination, was angered by the suggestion in the letter that the reason given for the request for his resignation was not the true one, and refused to speak to Mr. Ahmad about the matter as long as his letter of October 14, 1970,remained outstanding and was not withdrawn. From this moment on, the atmosphere in the Division, which had been an unhappy one indeed, became intolerable. Emotion ran high. Reason all but disappeared. Petty occurrances of the type which happen whenever people work together assumed proportions of cataclysmic events and remarks which in normal circumstances would have passed unnoticed became highly offensive. It is remarkable that any work was accomplished during this period.

Matters were not made any easier by the fact that Mr. MacMunn had a key role to play during this turbulent period. He is not a man of tact and, as I have indicated, had insufficient sensitivity, particularly at a critical time, to the feelings of members of ethnic minorities. In the eyes of the Senior Accountants, every word which Mr. MacMunn uttered was bound to be interpreted in the light of their vivid recollection of his regrettable "Archie-Bunker" - like stereotype statements -- "jokes" -- about ethnic minorities, made over the course of time without much awareness of their inappropriateness -- statements which associated Italians with lack of courage, Japanese with untrustworthiness, Black people with the jungle, and so on. Some of these statements were

made long before the period with which we are now concerned and relate back to the time when Mr. MacMunn was one of their peers and had coffee with them on a more or less regular basis. It is true that Mr. MacMunn, in his testimony, denied making such serious lapses from good taste but I am satisfied that Mr. Sato was not manufacturing them. The remarks were of such a nature as to be indelible in Mr. Sato's mind. They would be so unimportant to an insensitive person like Mr. MacMunn as to be easily forgotten. Perhaps the best illustration of the insensitivity to which I refer can be taken from Mr. MacMunn's testimony at the hearing. A statement was made by him in connection with the crisis in Quebec in October, 1970:

> "Q. There have been a number of statements attributed to you here Mr. MacMunn, in connection with things you were supposed to have said about other racial groups and in connection with French Canadians as one statement. Could you tell the Chairman what was said?
>
> A. As I sat here, I heard some very nasty remarks made which I disagree with absolutely. But this one about the French, I may straighten that out. I said this on two occasions, there were two Frenchmen, one a Mr. Delisle and Mr. Latoulippe and all I recall very distinctly back in the fourth year High School, we took Russian and we went into fair detail and I remember when some of the Provinces to the north of India, the Russians took the people of one nation and moved them somewhere and just dropped them off, like in Siberia, and they put others on and moved them back. Therefore, there was no trouble, but I was just saying if this was Russia, I know how they would do it, they would put the Quebec people on a train and move them some place else. Now, this isn't MacMunn's idea, I just said that if this was Russia, this is basically what they would do. I have nothing against the Russians or the French, it was just a statement, but I am supposed to have made the statement...
>
> THE CHAIRMAN: Is your evidence that this business about what would happen about Russian, was that intended as a joke?
>
> THE WITNESS: Oh, yes, they were just employees as

> far as I was concerned, as far as I'm concerned I try to treat everybody like another guy and just at this time we had the problem down in Quebec and some of the discussions were going and I just made this comment. Now, it very obviously was overheard and twisted around but it wasn't made as any slight remark on my part.
>
> THE CHAIRMAN: It was twisted around, but what did you intend. I don't get the joke. Could you explain it? I mean where is the humour in it?
>
> THE WITNESS: Well, let's not put it as a complete joke. The idea we would have to go back to the context of what we were talking about. I think at the time and there was Andre Latoulippe and possibly one other and myself just in talking and this just came out and I said, "If this were Russia, there would be no problem, this is what they would do," it was just like that.
>
> THE CHAIRMAN: Why would he want to know what the Russians would do? Is there a context here that I am missing?
>
> THE WITNESS: Just the problems that were there. I think at that time, let's fact it, various people were making various comments as to separation and unity and various things like that. You know, what solution would you have here or what problem would be created here, and as I say, I just made the joke half heartedly or jokingly, I just made this interjection, that is all. I know that was just one specific instance."

In addition to the circumstances which I have recounted, to support the allegation that Mr. Ahmad was discharged because of his race, colour and place of origin, reliance was placed on events which occurred after November 12, 1970, and particularly the circumstances which surrounded a meeting that was held under the chairmanship of Mr. Yockey on November 17, 1970. I bear all of those circumstances in mind in my consideration of Mr. Ahmad's case. My conclusion is that Mr. Ahmad's discharge was not because of his race, colour and place of origin and that no contravention of The Ontario Human Rights Code occurred when he was discharged.

I do not say that there was justification for his discharge. My appointment as a board of inquiry under the Code does not confer on me any power to decide whether Mr. Ahmad was wrongfully discharged unless that wrongfulness related to one of the prohibited acts referred to in the Code. I have found that it did not. At the same time I must say a word or two about the matter because it was argued that if the City did not satisfy me that the discharge was proper, I should draw the inference that Mr. Ahmad was discharged because of his race, colour and place of origin. I do not know what the evidence might have been if I had been sitting as an arbitrator in a wrongful discharge case rather than as a board of inquiry under the Code. It is hard to believe that there exists any evidence that I did not hear. Although the evidence I heard does not persuade me that Mr. Ahmad's performance was so incompetent under the prevailing circumstances as to merit discharge, I am nevertheless clearly convinced that his dismissal was not the result of discrimination based on race, colour or place of origin. Despite what I have said about Mr. MacMunn, I do not believe that he would commit an act, prohibited by the Code, against any of his staff. Even if he were so minded,no reasonable explanation is to be found in the evidence for picking on Mr. Ahmad who certainly, from a personal point of view, was less a thorn in his side than others. Moreover, I do not think that Mr. MacMunn's sense of security is strong enough, even if he were so minded and, with all his faults, I do not believe that he is, to discriminate in his treatment of employees on the grounds of race, colour and place of origin. If I had to go further

than simply to find that the discharge was not because of any of these factors, I would say that the unhealthy atmosphere which prevailed in the Division , coupled with Mr. MacMunn's own administrative limitations, brought about a questionable judgment which Mr. Yockey, because of his philosophy about the relationship between subordinates and authority, endorsed out of principle. But, as I have already said, my appointment does not entitle me to pass a judgment at large on the judgment of Messrs. MacMunn and Yockey. It is enough to say that they and, through them, the Corporation of the City of Toronto did not violate section 4 of The Ontario Human Rights Code in discharging Mr. Ahmad.

I turn now to the complaints of Mr. Archibald Lyn and Mr. Roy Sato and, in doing so, make the comment that all of the preceding discussion of the atmosphere which prevailed in the Accounting Division, during the period beginning with the creation of the Department of Budgets and Accounts, is relevant when considering these two complaints. I shall state my conclusion first. Despite the regrettable nature of the decisions which were made in respect of Messrs. Lyn and Sato, I have concluded that they were not discriminated against and harrassed in contravention of any provision of The Ontario Human Rights Code. The provisions of the Code which they allege were violated by the City through Messrs. MacMunn and Yockey are as follows:

> "4.--(1) No person shall,
>
> ...
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> (c) refuse to train, promote or transfer an employee;
>
> (d) subject an employee to probation or apprenticeship

or enlarge a period of probation or apprenticeship;

because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee."

"5. No person shall,

...

(b) threaten to dismiss or threaten to penalize in any other way any person in regard to his employment or any term or condition thereof;

(c) discriminate against any person in regard to his employment or any term or condition thereof; or

(d) intimidate or coerce or impose any pecuniary or other penalty upon any person,

on the ground that such person,

...

(h) has participated or may participate in any other way in a proceeding under this Act."

Earlier in this decision reference was made to a meeting chaired by Mr. Yockey on November 17, 1970, five days after Mr. Ahmad was discharged. In attendance, in addition to Mr. Yockey, were Messrs. MacMunn, Larcina, Sato, Waschtschuk and Lyn. There was a complete conflict in the evidence as to the purpose of the meeting, the length of its duration and what occurred. This conflict is another reflection of the high state of emotion that characterized the Division. Messrs. Yockey and MacMunn felt the meeting had been called to discuss the organization of the Division and the modifications that would have to be made as a result of Mr. Ahmad's departure. Messrs. Sato and Lyn thought the purpose of the meeting was to consider Mr. Ahmad's dismissal in the light of an earlier statement which Mr. Sato attributed to Mr. Yockey that nobody would be fired. All agreed that when the issue was raised at the meeting, Mr. Yockey stated that he was not there to discuss Mr. Ahmad's dismissal and that the subject would not be discussed. Since

Messrs. Sato and Lyn maintained that was the purpose of the meeting they took the position that the meeting was then concluded and left the room. Mr. Yockey, on the other hand, maintained that the meeting had not been concluded and that the sudden departure of Messrs. Sato and Lyn was an act of insubordination and this was a subsequent factor in the assessment of their performance.

Mr. Archibald A. Lyn is a British subject of Chinese extraction and a native of Jamaica. He is a Certified Accountant and became employed by the City on July 17, 1967. At the time of the hearing he was a Senior Accountant in charge of the General Ledger section with some twenty employees below him. He is, in my judgment, a conscientious, loyal employee with a considerable amount of sensitivity about his membership in a "visible" ethnic minority. He cooperated actively in the investigation conducted by the Ontario Human Rights Commission in 1971. After that investigation was well under way, in fact on February 11, 1971, he received a letter dated January 28, 1971, from Mr. MacMunn, criticizing him for his insubordination in walking out of the meeting of November 19, 1970. The letter reads as follows:

> " This letter is to place on your employee record my dissatisfaction with your conduct at the meeting held in Mr. J. D. Yockey's office last November 19th, 1970.
>
> Your attitude, as displayed by getting up and walking out of the meeting before it was concluded, showed rudeness and insubordination on your part. Insubordination at the senior level of management which you presently hold is a serious offence. Another display like this will mean an automatic suspension."

Much later, indeed, during the course of the hearing, Mr. Lyn received an Employee Performance Report, made by Mr. MacMunn, which was highly critical of his performance and of his attitude. This report was significantly worse than a report which had been made a year earlier when he had only occupied his present position for a few months. It is my conclusion that, although in the environment I have discribed, Mr. Lyn's attitude was, from, management's point of view, negative and not conducive to the smooth functioning of a department, the assessment of his performance was less than fair. It exaggerated relatively small incidents of the kind to which I have already referred as well as petty annoyances caused by little conflicts with personnel in other departments on a very few occasions, matters which in normal circumstances would be totally ignored as inevitable strains in working relationships. But exaggeration was to be found on both sides. With reference to Mr. Ahmad's case, Mr. Ahmad read into small incidents an intention to discriminate against Senior Accountants in the Accounting Division, as compared with personnel in the Budgets Division, because the Senior Accountants were members of ethnic minorities. Such an intention did not, in my opinion, exist in fact and the incidents are too trifling to enumerate.

I am convinced that the letter of January 28, 1971, delivered on February 11, 1971, dredging up a relatively unimportant incident which occurred on November 17, 1970, and the strong nature of the criticism contained in the Employee Performance Report of July 1971, assuming it is relevant to the consideration of a complaint made much earlier, are further demonstrations of questionable judgment on the

part of Mr. MacMunn, supported by Mr. Yockey. But I find it impossible to believe that they amounted to conduct at which the Ontario Human Rights Code is aimed. The acts of which Mr. Lyn complains are, in my view, simply a reflection of the extraordinarily bad relationships that had been permitted to develop in the Division. I find some additional support for this conclusion in the belief that, however questionable may have been their judgment under onerous conditions, and however insensitive Mr. MacMunn may have been to minority feelings, Mr. Yockey and Mr. MacMunn are not stupid. It would have been the height of stupidity to attempt anything so gross as a violation of the Code at a time when the Commission was manifestly conducting an investigation and when a board of inquiry was sitting. They were on the horns of a dilemma. Very favourable treatment might be taken as a concession of guilt in respect of all the allegations which had been and were being made against them. Unduly strong criticism might be considered by some as an expression of retribution. The matters of complaint were consequences of an attempt to render an objective judgment. In the circumstances perfect objectivity was humanly impossible. In my view that judgment was harsh but it was not a violation of the Code. It is perhaps not irrelevant to point out that at this particular time Messrs. MacMunn and Yockey must have been acting with the assistance of competent legal advice.

Mr. Roy Sato has been a key figure in the Division and in the recriminations that have played such an important part in its history. A man of obvious competence, industry, courage, and leadership, he is also a man of hypersensitivity in matters of perceived

racial or ethnic discrimination. I emphasize in this context the word "perceived". For as I have indicated, petty annoyances were experienced and insensitivity was not absent. Mr. Sato, a Canadian citizen of Japanese ancestry is a Chartered Accountant whose employment with the City began on September 3, 1967. His experience in the Accounting Department was extensive and at the time of the hearing he was the Senior Accountant heading the Pre Payment Audit Section of the Division with some seven employees under him. His record is one of creativity, having designed some of the methods that were used in the Division. It is also clear that his over-confident manner which sometimes bordered on self-righteousness, was abrasive to others with whom he came in contact. Non-professional employees in the Division complained about his treatment of them, and here again one had the distinct impression that it was the contentious atmosphere at work and the adversary nature of the proceedings at the hearing that caused the magnification of petty occurrences beyond their true proportions.

It was Mr. Sato's hypersensitivity as much as anything else that caused his conduct to seem abrasive. Reference has already been made to his general and rather vague submissions in 1969 to the Ontario Human Rights Commission about racist policies in the Department. The choice of Mr. MacMunn over Mr. Sato was another contributing cause of his irritating manner. We have seen that so sure was he that he was the better man that he was prepared to allege that the examining board must have been biased on racial grounds. The facts (without the interpretation placed upon them) set out in his formal complaint dated March 4, 1971, and reproduced above, were, in substance, established by the evidence and I have expressed my view of many of them when

dealing with Mr. Lyn's case. As in Mr. Lyn's case, Mr. Sato too received letters in the early part of 1971 referring to events which had occurred much earlier. In Mr. Sato's case the correspondence on both sides was more voluminous and contained more acrimonious material than in Mr. Lyn's case, but the explanation for this state of affairs is the same unhealthy atmosphere in the Division that I have described before. One significant difference that made the conflict between Mr. Sato and Mr. MacMunn more acute should perhaps be mentioned. At all times the competition between these two men was keener than that between Mr. MacMunn and anyone else. At one stage, Mr. Sato was a greater rival to Mr. MacMunn than anyone else -- they received the same marks from the examining board on the oral examination preceding the choice of Mr. MacMunn as Director. Mr. MacMunn must have felt Mr. Sato to be a threat to his position and very likely was a reminder of his sense of insecurity in the awareness of his definite limitations as Director. This likely was aggravated by his inferior position with relation to his counterpart, the Director of Budgets, the other Division of the Department, who in the absence of the Commissioner, acted on his behalf. Mr. MacMunn's status as Director, on the one hand, would in Mr. Sato's mind symbolize a miscarriage of justice and the triumph of a person who was a white Anglo-Saxon of inferior ability over a Japanese Canadian of superior ability.

As in Mr. Lyn's case, so in Mr. Sato's case, the Employee Performance Report by Mr. MacMunn for Mr. Sato, dated February 26, 1971, that is when the investigation by the Ontario Human Rights Commission was well and patently under way, was essentially critical or negative. There was, however, an additional factor that made Mr.

MacMunn's treatment of Mr. Sato more serious than his treatment of Mr. Lyn and that was the withholding of Mr. Sato's annual increment. I reject the explanation for these actions that it was because of Mr. Sato's involvement with the Commission's investigation or because of his race, colour, or place of origin, that these actions were taken by Mr. MacMunn and I do so for the reasons I gave when discussing Mr. Lyn's complaint. I attribute Mr. MacMunn's treatment of Mr. Sato to the exercise of his judgment in trying circumstances and in a context of rivalry and even conflict arising out of matters that had nothing to do with race, colour or place of origin. As in the case of Mr. Lyn, Mr. Yockey endorsed the judgment of his subordinate, Mr. MacMunn. In all the circumstances, I regard their judgment as somewhat harsh but, again, I was not appointed to express my view of their judgment if it was not the result of discrimination based on race, colour, or place of origin or involvement in the work of the Ontario Human Rights Commission.

It might have been wiser of Mr. MacMunn not to withhold Mr. Sato's increment but this again was a matter of judgment. However in deference to the high quality of the argument addressed to me at the hearing, it is appropriate to spend a moment discussing the explanation for their decision. It was argued on behalf of Mr. Sato that the withholding of one's annual increment is a form of punishment or discipline. On behalf of the City the submission was made that no element of discipline is involved because salary increments are not automatic but must be earned. It is a sort of bonus for very good work and not a penalty for work of an ordinary quality for which the regular salary is recompense. If I had to decide the matter, I should say that as a practical matter in today's world, employees

who did not receive any "merit increase" would, with some justification, feel penalized. However, for the reason I have given, namely, that the decision was not related to discrimination on the basis of race, colour or place of origin or to involvement with the Commission's investigation, I do not have to decide the matter.

The explanation given for the decision with respect to the annual increment was that the City had, within the preceding year, adopted the recommendations of the Hickling-Johnston Report, the Report of an outside management consultant firm which reviewed all employees of the City earning more than $12,000.00 per year, including, therefore, all the Senior Accountants. One of the consequences of the Report was that annual increments now rose in amount from a few hundred dollars to something in the neighbourhood of $1,300.00. As a result, it was said, the City had decided that the prevailing practice of treating increments as virtually automatic was to stop. Although, again, I think the decision with respect to Mr. Sato's increment was rather severe, I cannot say that it was not one that could be arrived at except on a wrong basis within my terms of reference.

One other aspect of the Hickling-Johnston Report remains to be mentioned. The Report had the effect of changing the position of the Senior Accountants with relation to other management personnel to the detriment of the former. In part, this result seems to have been the product of reconsidering the status of corresponding employees in the other section of the Department. Since the Director of Budgets was effectively second in command of the entire Department, he was to earn more than the Director of Accounting and this meant a relative

downgrading of all subordinate personnel vis-a-vis the Division of Budgets. Even this development was the source of a grievance on the part of the complainants who related it, particularly in Mr. Ahmad's case, but in the others' as well, to discrimination against members of ethnic minorities. Their point was that Mr. Yockey's failure to press the objections of the Senior Accountants to the implementation of the Hickling-Johnston Report, was a symptom of his racist views on policy. The point, in my opinion, is totally devoid of merit and is another reflection of the hypersensitivity to which I referred.

In setting out the reasons for my decision I have not, by any means, listed every matter to which one or more of the complainants referred in their evidence and their argument that the cumulative effect of all of them is to drive one to an irresistible conclusion of discriminatory practice. The entire list includes many matters such as, for example, the inability of the Senior Accountants to be selected as Budget Management Analysts and the practice with respect to payment by the City of fees for memberships or courses. Those which I have omitted are in my opinion, either so trifling or inaccurate as to be without any probative value.

To conclude, by way of repetition, I am deeply grateful to counsel who appeared at the hearing; their participation was of the highest quality, in the best traditions of the Bar, and was of invaluable assistance in an indescribably difficult matter. Finally,

I find that the complaints of Messrs. Sato, Lyn and Ahmad, have not been established and that the Corporation of the City of Toronto has not contravened the provisions of The Ontario Human Rights Code.

DATED at London, Ontario, this 28th day of February, 1973.

Horace Krever

Horace Krever, Q.C.